IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 150 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHOI SHANABHAI BUDHABHAI

Versus

SARVADAMAN CHIMANBHAI PATEL

Appearance:

M/S ANAND ADVOCATES for Petitioner

MR HARIN P RAVAL for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 25/04/2000

C.A.V. JUDGEMENT

1. This Civil Revision Application under Section 115 of the Code of Civil Procedure, 1908, has been filed by

the petitioner being the original defendant challenging the order dated 20th December, 1995, recorded by the learned Joint Civil Judge (J.D.) Anand, below application Exh.121 in Regular Civil Suit No.318 of 1992 whereby the learned trial Judge allowed the said application of the respondent for amending the plaint as per the request of the respondent.

2. The respondent above named preferred Regular Civil Suit No.318 of 1992 against the petitioner for declaration and injunction that the petitioner may not disturb the possession of the suit property and for restraining the petitioner from transferring or alienating the suit land in any manner whatsoever. It appears that the respondent also filed an application for interim injunction against the petitioner on the same day i.e. 18th July, 1992. Ultimately the respondent failed in getting temporary injunction and in fact the temporary injunction did not remain in existence when the aforesaid application Exh.121 came to be filed by the respondent.

3. The original suit was for declaration and injunction and now by way of the said application Exh.121 the respondent desires to amend the plaint by adding a relief for specific performance of the contract in question. The respondent also desires to now mention that the respondent was ready and willing to perform his part of the contract and therefore he is entitled to get executed sale deed in his favour. The said application was objected by the petitioner. After hearing the parties, the learned trial Judge allowed the application Exh.121 and permitted the respondent to amend the plaint.

4. Feeling aggrieved by the said order of the trial court, the petitioner has brought this Civil Revision Application before this Court. It has been mainly contended here that civil suit was filed on 18th July, 1992; the written statement was filed on 29th August, 1992, and the application Exh.121 for amending in the plaint for adding the relief for specific performance of the agreement was filed on 29th November, 1995. Thereby the petitioner alleges the aforesaid amendment was sought three years after the submission of the written statement and therefore the said relief was barred by law of limitation.

5. The aforesaid plea was not accepted by the trial court and therefore the trial court permitted to the respondent to amend the plaint. Therefore the said order is in dispute before this Court in this civil revision application.

6. I have heard learned advocates for the parties and have perused the papers.

7. The facts are not much in dispute. The suit was filed on 18th July, 1992. The interim injunction application was also submitted. The petitioner submitted written statement and reply to the plaint as well as to the interim injunction application on 29th August, 1992. In that written statement, and in objections to the interim injunction application the present petitioner positively alleged that there was no such agreement executed by him in favour of the respondent. This was the reply to the case put forward by the respondent in the plaint as well as in the interim injunction application that the petitioner had executed an agreement to sell in favour of the respondent. So in reply to the said averment the petitioner made it clear that no such agreement was executed by him and therefore there was no question of implementing the same.

8. On this aspect, learned advocate for the respondent has streneously argued that, under Section 54 of the Limitation Act, the limitation provided is three years for specific performance of an agreement and the limitation would start running from the date on which the performance is refused by the otherside. It has therefore been contended that there is no refusal and therefore the time has not started and therefore the amendment would not be barred by law of limitation.

9. It is not possible to agree with the said argument advanced by learned advocate for the respondent. The simple reason is that the agreement in question was specifically referred in the plaint as well as in the interim injunction application. The petitioner has submitted written statement and reply to the interim injunction application. In both of them the petitioner has positively said that it is denied that he had executed agreement in favour of the respondent. Learned advocate for the respondent has argued that there was simply denial to the execution but there was no refusal to perform his part of the said agreement. Here it is to be considered that even in the interim injunction application the respondent has positively stated that though the petitioner had executed an agreement to sell and though the respondent was agreeable to perform his part of the agreement, the petitioner was acting contrary to the said agreement and therefore the suit was required to be filed.

10. Learned advocates for the parties have taken me through the averments made in the plaint also. The respondent has made it clear in the plaint itself that the petitioner was not agreeing to execute sale deed in favour of the respondent. This would mean that even before filing of the suit the petitioner had made it clear that there was no agreement executed by him. Even during the pendency of the interim injunction application. The said stand was maintained by the petitioner. The interim injunction application of the respondent has been turned down finally by the court below and that order is in existence. This would make it clear that the petitioner had not only disputed the said agreement but had disputed the execution contents and the very existences of the said agreement. I am of the view that it amounts to refusal to perform his part of contract and therefore the cause of action to file a suit for specific performance arose on the date on which the said refusal was brought on the record of the trial court. The said refusal was recorded in the written statement and objection on 29th August, 1992. In that view of the matter, the cause of action for filing the suit for specific performance arose atleast on 29th August, 1992, and, therefore, the said relief ought to have been sought for latest by 28th August, 1995. If it is sought subsequent thereto, then the suit would be time barred. Similarly, if the application for amendment was to be made then it ought to have been submitted by the respondent before the trial court before 28th August, 1995. Admittedly, the amendment application was submitted on 29th November, 1995. That clearly shows that the amendment was sought for 3 years after the date on which the cause of action can be said to have arisen in favour of the petitioner. So even on the pleadings of the respondent himself the relief sought for by the respondent by way of amendment would be time barred. It is a settled principle of law that the time barred relief cannot be permitted to be allowed even by way of amendment under Order 6 Rule 17 of the CPC.

11. Even otherwise the respondent had stated in the plaint itself that the petitioner was not agreeing to execute sale deed in his favour in terms of the agreement in question. So even before the date of filing of the suit it was conveyed to the respondent that the petitioner was not agreeing to perform his part of the contract. That would make it further clear that even on on the date of the suit, the denial of agreement was known to the respondent and therefore the cause of action for filing suit for specific performance actually arose even before the date of the presentation of the plaint

and, therefore, the respondent was obliged to file suit for specific performance within three years from the date of the denial/refusal itself. The plaint was presented on 18th July, 1992, containing the statement of fact that the petitioner was not agreeing to execute sale deed in favour of the respondent. In that case, the suit for specific performance could not be filed beyond 18th July, 1995. In other words, the relief for specific performance of the agreement could not be introduced in the plaint after 18th July, 1995. As stated above, the said relief is sought to be introduced for the first time in the plaint on 29th November, 1995. This shows that the relief is sought to be added three years after the institution of the suit and three years after the submission of the written statement. In that view of the matter, it is clearly found that the said relief was time barred on the date on which it was sought to be introduced in the plaint.

12. As stated above, there is a settled principle of law that time barred amendment could not be permitted by the court. For this purpose, it would be relevant to consider a decision of K.Raheja Constructions Ltd. Vs. Alliance Ministries and others reported in AIR 1995 SC page 1768. The head-note reads as under:

> "O.6 R.17- Amendment of plaint - Suit filed for relief of permanent injunction restraining respondents from alienating, encumbering, selling, disposing of, or in any way dealing with property - Subsequently amendment of plaint sought for relief of specific performance of contract - Plea that amendment was necessary in view of subsequent knowledge about permission being granted by Charity Commissioner to alienation - Not tenable Plaintiff having expressly admitted in plaint that defendants have refused to abide by terms of contract Relief for specific performance ought to have been asked in original suit itself - Relief of specific performance cannot be allowed to be added after lapse of seven years, being barred by limitation."

This decision has laid down principle that time barred amendment is impermissible.

13. It is very relevant to note that in the said matter also the plaintiff very well knew and admitted in the plaint that the defendants had refused to abide by terms of contract, therefore, according to the decision

of the Hon'ble Apex Court the said relief ought to have been claimed by the plaintiff in the suit itself.

14. In the case before us, the respondent has come out with a case that the petitioner had disputed the execution and existence of the document. As stated above, I am of the view that this amount to be refusal to perform his part of the contract and therefore the facts of the case before us and the facts of the case referred to above are similar and, therefore, the principle enunciated in the aforesaid matter squarely applies to the fact before us. Therefore it has to be held that the present amendment for specific performance was time barred on the date on which the application for amendment in the plaint Order 6 Rule 17 was submitted to the trial court.

15. Another decision has been reported in AIR 1996 Supreme Court page 642 in the case of Muni Lal Vs. The Oriental Fire & General Insurance Company Ltd. and another. The head-note reads as under:

"Specific Relief Act, S.34 proviso - Amendment of plaint - Permissibility - Truck owner, on not returning of truck, merely asking for declaration that he is entitled to payment for loss of truck but not seeking consequential relief of payment of quantified amount - Permission sought in appeal to amend plaint to include unsought relief Relief becoming time barred at that stage Plaintiff, appellant cannot be permitted to amend plaint after suit for relief in question was barred by time during pendency of proceedings."

Almost similar position was therein in the case of Radhika Devi Vs. Bajrangi Singh and others reported in AIR 1996 Supreme Court page 2358. The head-note reads as under:

"Amendment of plaint - Partition suit - Defendant in written statement specifically pleaded about gift deed made in his favour regarding property in dispute Amendment of plaint seeking declaration that gift deed was obtained illegally and fraudulently, filed beyond period of limitation - Defendant acquired right by bar of limitation - Amendment if allowed would defeat right accrued in favour of defendant - Amendment not allowed."

The said application was filed beyond the period of

limitation. The Hon'ble Apex Court clearly laid down that the defendant had acquired right by bar of limitation, therefore the amendment if allowed would defeat the right accrued and therefore the amendment was not allowed.

16. In the present case also even before filing of the suit the respondent had made clear in the plaint as well as in the interim injunction application that the petitioner was not agreeing to execute sale deed in favour of the respondent. This mean that the respondent knew very well before the date of the suit that the petitioner was disputing the very execution and existence of the document, therefore, the cause of action for filing suit for specific performance arose before the date of the suit. Therefore the relief ought to have been included in the plaint and if it was not so done then it should have been done latest within three years from the date of the suit. As stated above, the suit was filed on 18th July, 1992; the written statement was filed on 29th August, 1992, and the amendment was sought on 29th November, 1995. It again shows clearly that the amendment was sought after lapse of more than three years. Therefore the relief sought to be amended under Order 6 Rule 17 of the CPC was clearly time barred on the date on which the application for amendment Exh.121 was submitted.

17. Then during the course of the argument, it could be gathered that, as per the case of the respondent he was in possession of the land in question. The petitioner disputed the fact of possession and ultimately the trial court has held that, prima facie, the respondent was not in possession of the suit land. This also shows that, even before filing the suit, there was serious dispute about the execution and contents of the said agreement within the knowledge of the parties. Therefore also by expressed denial of the execution, contents and existences of the document, the respondent has disputed the agreement and refused to perform his part of the contract. On the other hand, by the aforesaid conduct, the petitioner has again disputed the contract and refused to perform his part of the contract. So from all angles it becomes clear that the application for amendment in plaint was barred by law of limitation on the date on which it was submitted in the trial court.

18. The only arguments advanced on behalf of the respondent is that the petitioner simply denied the execution of the contract and refused to execute the sale deed. In my view, the averments made in the written

statement and objection to the interim injunction application to the effect that the petitioner was disputing the very existence execution and contents of the said agreement amounted to refusal to perform his part of contract. Therefore, the cause of action for specific performance arose before the date of the suit and since the amendment was sought three years after presentation of the plaint and three years after presentation of written statement, the said application for the amendment of the relief for specific performance was clearly barred by law of limitation.

19. Therefore under the settled position of law, the trial court ought not to have allowed the amendment and the said order must be treated to be an order passed with material irregularity relating to jurisdiction which has resulted into miscarriage of justice and failure of justice since the order of the trial Court allowing amendment in plaint under Order 6 Rule 17 of the CPC after expiry of the period of limitation takes away the valuable right of the petitioner to defend the case on the point of limitation.

20. In aforesaid view of the matter, since there is failure of justice on account of illegal order of the trial court, it is necessary for this Court to interfere with this revision application.

21. I am therefore of the view that the order of the trial court is illegal and deserves to be set aside on the aforesaid consideration. This Civil Revision Application is therefore allowed. The order passed by the learned trial Judge on 20th December, 1995, in Regular Civil Suit No.318 of 1992 allowing the application Exh.121 of the respondent for amendment in the plaint is set aside and application of the respondent at Exh.121 before the trial court for amending the plaint is ordered to be dismissed. Considering the facts and circumstances of the case, the respondent shall pay cost of this petition to the petitioner and shall bear his own cost in this revision application. Rule is made absolute to the aforesaid extent.

(D.P. Buch, J.)

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